IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.02.2007

CORAM :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

Writ Petition Nos.2359, 2580 and 2631 of 2006
(O.P.Nos.248, 46 and 47 of 2004)

M/s.Tamil Nadu Magnesite Limited
5/53, Omalur Main Road
Jagir Ammapalayam
Salem - 636 302. .. Petitioner in all the W.Ps

-Vs-

1. The State of Tamil Nadu
represented by its Secretary
Commercial Taxes Department
Fort St.George
Chennai - 600 009.

2. The Commercial Tax Officer
Suramangalam Assessment Circle
Salem. .. Respondents in all W.Ps

Prayer: Original Petition in O.P.No.248 of 2004 is filed before t
Tamil Nadu Taxation Special Tribunal seeking for the relief of calli
for the records of the second respondent in T.N.G.S.T.No.2800193/19
2000 and set aside the impugned proceedings dated 31.7.2003 as the sa
has been passed without considering the objections and documents fil
by the petitioner without granting personal hearing as contemplat
under the provisions of the TNGST Act and also against the principles
natural justice.

Original Petition in O.P.No.46 of 2004 is filed before the Tam
Nadu Taxation Special Tribunal seeking for the relief of calling
the records of the second respondent in T.N.G.S.T.No.2800193/1999-20
and set aside the impugned proceedings dated 31.3.2003 as the same h
been passed against the provisions of the T.N.G.S.T.Act and al
unconstitutional as being beyond the State's taxing power under Entry
in List II in the Seventh Schedule to the Constitution of India in
far as the levy of tax under Section 7A and 3(4) of the T.N.G.S.T.Act.

Original Petition in O.P.No.47 of 2004 is filed before the Tam
Nadu Taxation Special Tribunal seeking for the relief of calling

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the records of the second respondent in T.N.G.S.T.No.2800193/2000-20 and set aside the impugned proceedings dated 31.3.2003 as the same h been passed against the provisions of the T.N.G.S.T.Act and al unconstitutional as being beyond the State's taxing power under Entry in List II in the Seventh Schedule to the Constitution of India in far as the levy of tax under Section 7A and 3(4) of the T.N.G.S.T.Act.

The O.Ps have been transferred to this Court and re-numbered Writ Petitions on the abolition of the Tribunal.

For Petitioner : Mr.P.Rajkumar

For Respondents: Mr.Haja Nazirudeen,Spl.G.P.(Taxes)

O R D E R

The issue involved in all the above writ petitions is one and t same and the parties are also one and the same. The argument advanced the respective parties is also the same. On consent of the parties, t writ petitions are taken up today for disposal together.

2. The facts of the case are as follows:

The petitioner, a Government of Tamil Nadu undertaking, is registered dealer with the second respondent herein both under the Tam Nadu General Sales Tax Act, (hereinafter, referred to as "the TNG Act") and Central Sales Tax Act, (hereinafter referred to as "the C Act"). The petitioner was originally granted temporary worki permission for a period of nine months from 26.9.1997 to 25.6.19 for mining magnesite and dunite over an extent of 177.96 hectares forest land in Salem Division subject to certain conditions by G (2D) No.53, Environment and Forests (FRX) Department dated 23.10.19 Subsequently, by Government Order in G.O.Ms.NO.234, Environment a Forest Department dated 6.8.1998, the Government of Tamil Nadu renew the lease in favour of the petitioner for the said area of 177 hectares (168.78 hectares of already broken up area and 9.882 hectar of to be broken up area) for a period of ten years from the date issue of said order on certain conditions. Pursuant to the grant lease, the petitioner also entered into Mining lease in Reserve Fore Agreement under Forest(Conservation) Act, 1980 with the District Fore Officer, Salem on 24.11.2002 agreeing all the conditions contain therein and the conditions in respect of payment of rent and royal reserved therein.

3. For the assessment year 1999-2000, the petitioner filed t monthly return in Form A1 under TNGST Act reporting their total a taxable turnover of Rs.2,61,85,450.48ps and Rs.2,58,28,274.32ps claim exemption over a turnover of Rs.3,57,176.16ps. The petitioner's boo of accounts were called for and checked for framing of the assessment

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the second respondent - the assessing officer. Upon checking of t returns filed by the petitioner with reference to the books of account the second respondent issued pre-assessment notice on 16.12.20 pointing out certain defects and omissions in the returns filed by t petitioner vis-a-vis their accounts. I am of the view that all t defects stated in the pre-assessment notice need not be reproduced the point over which the petitioner raised the issues in these wr petitions are in respect of defects stated in paragraph Nos.3, 6 and The defects pointed out in 3 and 6 and assessed to tax are the subje matter of W.P.Nos.2580 and 2631 of 20006 and that of paragraph No.7 the subject matter of W.P.No.2359 of 2006. The major and the only iss argued is in respect of the view taken by the second respondent paragraph No.3.

4. In paragraph No.3 of the notice dated 16.12.2002, the seco respondent has pointed out that the petitioner has excavated m magnesite, a taxable goods from the lands owned by the Government Tamil Nadu for a price consideration and consumed them in t manufacture of other goods for sale. Such consideration paid for t quantity of the mineral is the purchases consideration and a assessable to tax at 11 percent under Section 7A of the TNGST Act. T quantity quarried during the assessment year 1999-2000 has be arrived to 78,000 MTs and the value of the same was arrived Rs.8,10,20,845/-, which quantity and value are stated by the petition in schedule 25(15) of Annual report of the petitioner company.

5. The other defect pointed out in para 6 was that the petition has effected purchase of furnace oil for Rs.5,54,58,158.00 at t concessional rate of tax under the cover of Form XVII for use manufacture of finished goods. Out of the finished goods manufactured, the stock worth about Rs.7,57,695/- has been exported o of India, which made the petitioner ineligible for lower rate of t under Section 3(3) and 3(4). The petitioner is therefore liable to p the differential tax of one percent on the turnover by a formula und Section 3(4) of the TNGST Act viz.,

$$\frac{\text{Total purchase value of goods made against Form XVII declarations}}{\text{Total sale value of the goods (including stock transfer, 'consignment sales and export sales manufactured out of Form XVII)}} \times \left\{ \begin{array}{l} \text{Value of goods sent to an agent or branch in other State and to other country by export} \end{array} \right\} \left\{ \begin{array}{l} \text{Purchase value of goods against Form XVII declaration and used in the goods despatched to a place outside the State eithe by branch transfer to a agent and in the good exported.} \end{array} \right.$$

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The differential tax at the rate of one percent under Section 3 of the TNGST Act has been arrived at in a sum of Rs.1,95,815/-.

6. The other proposal at para 7, which is the subject matter of t writ petition No.2359 of 2006 was that the dealer has incurred expens in a sum of Rs.60,63,294.00 towards packing and forwarding charges per Schedule 23 of Annual Report of the petitioner during the releva assessment year 1999-2000. According to explanation clause (ii) Explanation 2 of Section 2(r) of the TNGST Act, the amount for whi goods are sold shall include any sums charged for anything done by t dealer in respect of the goods sold at the time of or before t delivery thereof. The packing and forwarding charges in a sum Rs.60,63,294/- has not been assessed for tax. The same has to be tax at 11%.

7. Thus, among other things, by pointing out the above thi defects, the second respondent called upon the petitioner to file the objections, if any, to the proposal prior to 30.12.2002. The petition on 29.12.2002 filed their objections to the proposal. In respect the proposal of levying tax under Section 7A, the dominant objection the petitioner was that inasmuch as the taxable goods "raw magnesit was quarried from the petitioner's leasehold land and consumed petitioner's factory, the taxable goods was petitioner's own goods a there was no element of purchase and in that event of the matter, t respondents cannot invoke section 7-A of the TNGST Act. It was furth explained that the quantity and value shown in the Annual Report was t quantity and value of the mineral excavated from the leasehold land a the purchase value of the mineral purchased from M/s.India Magnesi Product Limited. The disclosure of such particulars in the Annu report was for the purpose of complying with the provisions of t Companies Act, 1956.

8. In respect of the proposal pointed out in paragraph No.6, it w explained by the petitioner that Section 3(4) is applicable only i despatch of goods to a place outside the State either by branch transi or to an agent. However, the sum of Rs.7,57,695/- represents value direct export sale made under form H. The above turnover was credited their account. Thus, the petitioner sought for deletion of th turnover.

9. The second respondent - assessing officer by his proceedin dated 31.3.2003 confirmed the proposals in respect of Section 7-A t and 3(4) determination by giving reason for overruling the objectio raised. In the assessment order, in respect of the proposal to inclu the turn over of packing and forwarding charges, nothing was state Subsequently, the respondent issued a notice dated 2.6.2003 inform the petitioner that in the assessment order dated 31.3.2003, t proposal to bring the turnover in a sum of Rs.60,63,294/- representi

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the packing charges, loading charges paid to the contractor was omitt
to be assessed, though in the pre-assessment notice dated 16.12.200
this was pointed out and objection has also been received.
consideration of the objections already received, the assessing offic
pointed out that the petitioner has not proved the fact that the sa
value was inclusive of packing and forwarding charges and the proposa
to assess the turnover of Rs.60,63,294/- has to be confirmed.
further informed the petitioner in the same notice that in the event
confirmation of the proposal of the said turnover, penalty should al
be levied under Section 12(3)(b) of the TNGST Act and called for
objection. The petitioner filed their objection on 9.6.2003 by annexi
certain invoices to show that the packing and forwarding charc
incurred by them has been included in the sale price. By proceedin
dated 31.7.2003, the objection so raised has been rejected and the sa
turnover has been brought to tax at 11 percent. That portion of t
order is challenged in W.P.No.2359 of 2006.

10. The royalty paid, which has been regarded as purcha
consideration and assessed to tax under Section 7-A, in respect of t
assessment year 2000-2001, is put in issue in W.P.No.2631 of 2006.

11. It is contended on behalf of the petitioner that the seco
respondent has no jurisdiction to levy purchase tax under Section 7-A
the TNGST Act as the quarrying of raw magnesite was nothing but proi
a prendre, which is an immovable property and beyond the State's taxi
power. By Government Order in G.O.Ms.No.234 dated 6.8.1998, t
petitioner became a lessee of the forest land for the purpose of mini
magnesite. There was no sale by the State to the petitioner. The bas
ingredient of purchase is absent in the case on hand. Hence, t
invocation of Section 7A of the TNGST Act is not applicable. In order
sustain his argument, the learned counsel relied on the case of t
Supreme Court of India in the case of STATE OF ORISSA AND OTHERS V
TITAGHUR PAPER MILLS CO.LTD. AND ANOTHER reported in (1985) 60 STC 2
and also THE INDIA CEMENT LIMITED VS. STATE OF TAMIL NADU reported
AIR 1990 SC 85.

12. I heard the argument of the learned counsel on either side a
perused the material on record.

13. From the facts above stated, what is assailed in these wi
petitions is an assessment order passed by the statutory authority, w
is having competence to pass an assessment order. Hence, all t
objections can very well be raised before the appellate authority
filing an appeal. However, the learned counsel for the petitior
contended that filing of an appeal under the statutory provision is
exercise in futility as the present case is squarely covered by t
decisions of the Supreme Court in the case of STATE OF ORISSA A
OTHERS VS. TITAGHUR PAPER MILLS CO.LTD. AND ANOTHER reported in (198

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60 STC 213 and also THE INDIA CEMENT LIMITED VS. STATE OF TAMIL NA reported in AIR 1990 SC 85.

14. I am afraid to accept the contention of the petitioner th the issue involved i.e., levy of purchase tax on the value of t mineral for which royalty has been paid in addition to the lease amou for the surface soil by the petitioner is covered by the above refer decisions of the Supreme Court reported in (1985) 60 STC 213 and A 1990 SC 85. The facts of the present case stand in a totally differe footing.

15. In the first case i.e., 60 STC 213, by notificatio S.R.O.Nos.372 and 373 dated 23rd May, 1977, issued under sections 3 and 5 of the Orissa Sales Tax Act, 1947, the Orissa State Governme declared that "standing trees and bamboos agreed to be severed" we liable to tax at a certain rate on the turnover of purchases with effe from 1st June, 1977. On 29th December,. 1977, as a consequence of t amendment of section 5 of the Act, the Government issued two oth similar notifications, S.R.O.Nos.900 and 901, in suppression of t notifications dated 23rd May, 1977. Some of the petitioners had tak settlement of forest areas for exploitation of bamboos and some othe had taken annual settlement for exploitation of timber and other fore produce. All of them filed writ petitions and contended, inter ali that by imposing purchase tax on "bamboos and standing trees agreed be severed", the State Government was not imposing any tax on "sale goods", that if there was any sale of goods, the State Government w taxing the same goods twice, once at the purchase point and again at t sale point, which was forbidden by law, and that, therefore, t notifications were beyond the competence of the State Government. T contention of Revenue, inter alia, was that bamboos and trees agreed be severed were different commercial commodities from bamboos and timb after they were felled and therefore the Government was competent to t them, both at the sale point and purchase point. In those factu circumstances of the case and having regard to the licence agreeme entered into between the parties, the High Court of Orissa at Cutta held that under the agreement relating to exploitation of timber a forest produce, persons taking auction were liable to reimburse t sales tax to the forest department. Trees which were agreed to severed and which were exigible to sales tax also became exigible purchase tax under the notifications. In common parlance, trees bamboos after they are severed are timber and bamboos respectively. T nature and character of the felled trees and bamboos do not change wh they are brought outside the forest for the purpose of sale. There is material distinction between the two. The trees and bamboos agreed to severed are commercially the same goods as the trees and bamboos. Th the trees which are otherwise immovable property are construed movable property because of the fact of impending severance. Therefo in the case of standing trees or timber, title can pass either bef severance or after severance and the intention of the parties is to

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gathered from the documents. If the intention of the parties was th title should pass before severance, then the petitioners got the ri to cut and carry timber of specified species and, till the trees we cut, they remained the property of the Government. If the notificati purported to impose tax at that point, it would amount to taxing at point of time before title passed, while the trees still remained t property of the Government and the notifications would be imposing a t on an agreement to sell or a tax on immovable property. If the parti had agreed that the property in the trees should pass after severanc then what passed was "timber" of the trees, which was the subject-matt of tax at the sale point. Therefore, if the State Government purport to tax by the notifications on the purchase of "bamboos agreed to severed" or "trees agreed to be severed", then what it did was to tax agreement to sell or to tax the trees or bamboos at the purchase poi while the bamboos or trees were assessed at the point of sale also. Th standing trees are unascertainable goods and continue to be the proper of the Government until felled. Title to the trees would be transferr in favour of the petitioners only when after compliance of all t conditions of the agreement, the trees were felled or severed by the The notifications could not be construed to impose purchase tax standing trees or timber before severance which would amount to impost of tax on an agreement to sell and not on actual sale. Th bamboos which would come in future were also the subject-matter transfer but such transactions also amounted to profit a prendre a could not amount to sales or purchases of goods as envisaged under t Sale of Goods Act, 1930. That the notifications were accordingly ult vires the provisions of the Act. In the case of bamboo exploitati contracts, the notifications also amounted to impost of tax on profit prendre and, as such, were against the provisions of the Act. On t above said reasoning, the High Court quashed the notifications.

16. The Revenue carried the above matter on appeal to the Supre Court and the Supreme Court in 60 STC 213, after construing t agreement has held that by reason of the operation of the Fore Contract Rules, the property in bamboos passed to the company on after the bamboos were felled, taken to the depots at inspection poin and there checked and examined and thereafter removed from the contra area. The notifications did not have any application and the amou payable under the bamboo contracts were not exigible to purchase t in the hands of the company. That the bamboos contract was not contract for the sale of goods. The bamboo contract was not a lease the grant of an easement; it conferred upon the company a benefit arise out of land, namely, the right to cut and remove bamboos, whi would grow from the soil coupled with ancillary rights and was thus grant of a profit a prendre. Any attempt on the part of the Sta Government to tax the amounts payable under the bamboo contracts wou not only be ultra vires the Orissa Act but also unconstitutional being beyond the taxing power of the State Legislature under entry 54 List II of the Seventh Schedule to the Constitution of India. That

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was not possible to view the bamboo contract as a composite contrac one an agreement relating to standing bamboos agreed to be severed, a the other, an agreement relating to bamboos to come into existence the future. It was one integral and indivisible contract not capable being severed. Holding thus, the Supreme Court reversed the judgme of the High Court on the point of constitutionality and vires b confirmed on the point of non-applicability of the provisions of t notification imposing tax on purchase of trees and bamboos agreed to severed.

17. In the case on hand, it is not a licence but it is a leas which is not disputed, but an admitted fact. As could be seen from t Government Order in GO.Ms.No.234 dated 6.8.1998, wherein lease has be granted to the petitioner for ten years on condition of execution statutory lease agreement as per the provisions of the Mines a Minerals (Development and Regulation) Act, 1957. The lease deed executed by the petitioner with District Forest Officer provided payment of amount by the petitioner towards annual lease rent for t land. In addition thereto, the agreement further provided for payment amount towards royalty over the quantity of minerals quarried. For t sake of clarity, the relevant portions of the agreement are extract below:

"PART - V - Rents and Royalties Reserved by This Lease.

Fixed yearly rent

1. The lessee should pay lease rent from 6th day of Aug'98 every year 12 1/2 % of the market value fixed by the Sub-Registrar, Omalur, and the lease rent revised every three years. (As per G.O.Ms.No.272, Environment & Forest, dt.15.6.91). As per market value, the lease rent is Rs.21,81,316/- per annum. The lease rent will be fixed and payable as when the same is decided by the government.

2) The lessee should pay to the District Forest Officer, Salem Forest Division, Salem on the day of 1st April in each year Royalty on minerals despatched from the leased area at the rate specified below (as fixed in Govt. of India Gazette No.156, New Delhi, dt.11th April 1997) Rs.25/- (Rupees twenty five only) per tonne. ...

2(A) .....

PART - VI - Provisions relating the Rents and Royalties, Place of Payment.

1. The rents and royalties mentioned in Part-V of the Schedule shall be paid free from any more deductions to the Sub-Treasury at Salem or to such other officer and at such other place as the Government shall from time to time appoint. Provided Always and it is hereby agreed that Rs.1,000/- the balance standing to the credit of the lessee on account of the deposit made by the lessee on applying for this lease shall be retained and accepted by the Governor in satisfaction of the rents and royalties mentioned in Part-V until they reach that

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amount.

2. ....

3. For the purpose of computing the said Royalties the lessee shall keep a correct account of the minerals produced and despatched. The accounts as well as the weight of the minerals in stock or in the process of export may be checked by any Officer authorised by the Government or the Central Government.

PART - VII - The Covenants of the Lessee/Lessees, To pay rents, royalties, rates and taxes.

The lessee shall pay the rents and royalty reserved by this lease at the times and in the manner provided in Parts V and VI and shall also pay and discharge all taxes rates, assessments, cess or royalities and impositions whatsoever being in the nature of public demands which shall from time to time be charged, assessed or imposed upon or in respect of the mines or works of the lessee or any part thereof by authority of the Central Government or that of the State Government or otherwise except demands for land revenue and shall also pay interest at the rate of six per cent per annum or that may be fixed from time to time on all arrears of such rents or royalty from the date whereon the same ought to be paid under these presents."

18. From the above, it is clear that the petitioner has to p lease, rent in respect of the land given in lease. Apart from that, t lease rent so reserved, the petitioner has also to pay royalty on t mineral despatched from the leased area at the rate of Rs.25/- p tonne. The rate of royalty is revisable as provided under the agreeme with reference to the statutory provisions of the Mines and Minera (Regulation and Development) Act, 1957. The lease amount is for t entire area but the royalty is payable with reference to the quantity the minerals mined by the petitioner. It is well settled that t mineral belongs to the Government. For the purpose of exploiting t mineral, the royalty has to be paid.

19. I am of the view that in order to have more clarity on t concept of payment of royalty with reference to mining, it is useful refer certain passages of the judgment of the Supreme Court in the ca of D.K.TRIVEDI AND SONS AND OTHERS VS. STATE OF GUJARAT AND OTHE reported in AIR 1986 SUPREME COURT 1323, wherein it was held thus:

"35. ..... Before embarking upon a consideration of this question, it will be useful to know the meaning of the expressions dead rent and royalty and their connotation. ..... Jowitts Dictionary of English Law, 2nd Edn., at p. 555, defines dead rent as:

Dead Rent, a term sometimes used in mining leases in contradistinction to a royalty, to denote a fixed rent to be paid whether the mine is productive or not. See RENT.

The same dictionary states under the heading Rent, at p.

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1544: "When a mine, quarry, brick-works, or similar property is leased, the lessor usually reserves not only a fixed yearly rent but also a royalty or galeage rent, consisting of royalties (q.v.) varying with the quantity of minerals, bricks, etc., produced during each year. In this case the fixed rent is called a dead rent."

36. Royalty is defined in Jowitts Dictionary of English Law, 2nd Edn., at p. 1595, inter alia, as:

"Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right. See Rent."

Royalty is defined in Whartons Law Lexicon, 14th Edn., at p. 893, as:

Royalty, payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised.

The definition of royalty given in Blacks Law Dictionary, 5th Edn., at p. 1195, is as follows:

"Royalty, Compensation for the use of property, usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced. A payment which is made to an author or composer by an assignee, licensee or copyright holder in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent. Royalty is share of product or profit reserved by owner for permitting another to use the property. In its broadest aspect, it is share of profit reserved by owner for permitting another the use of property....

In mining and oil operations, a share of the product or profit paid to the owner of the property....

In H.R.S. Murthy v. Collector of Chittoor(1964) 6 SCR 666, 673: (AIR 1965 SC 177 at p.180), this Court said that royalty normally connotes the payment made for the materials or minerals won from the land. ...":

37. In Halsburys Laws of England, 4th Edn. in the volume which deals with Mines, Minerals and Quarries, namely, Vol. 31, it is stated in para 224 as follows:

"224. Rents and royalties. An agreement for a lease usually contains stipulations as to the dead rents and other rents and royalties to be reserved by, and the covenants and provisions to be inserted in, the lease...."

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The topics of dead rent and royalties are dealt with in Halsburys Laws of England in the same volume under the sub-heading Consideration, the main heading being Property demised; Consideration. Para 235 deals with dead rent and para 236 with royalties. The relevant passages are as follows:

.....

236. Royalties. A royalty, in the sense in which the word is used in connection with mining leases, is a payment to the lessor proportionate to the amount of the demised mineral worked within a specific period."

In paragraph 238 of the same volume of Halsburys Laws of England it is stated:

"238. Covenant to pay rent and royalties. Nearly every mining lease contains a covenant by the lessee for payment of the specified rent and royalties."

38. Rent is an integral part of the concept of a lease. It is the consideration moving from the lessee to the lessor for demise of the property to him. Section 105 of the Transfer of Property Act, 1882, contains the definitions of the terms lease, lessor, lessee, premium and rent and is as follows:

"105. Lease defined.A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

39. In a mining lease the consideration usually moving from the lessee to the lessor is the rent for the area leased (often called surface rent), dead rent and royalty. Since the mining lease confers upon the lessee the right not merely to enjoy the property as under an ordinary lease but also to extract minerals from the land and to appropriate them for his own use or benefit, in addition to the usual rent for the area demised, the lessee is required to pay a certain amount in respect of the minerals extracted proportionate to the quantity so extracted. Such payment is called "royalty". It may, however, be that the mine is not worked properly so as not to yield enough return to the lessor in the shape of royalty. In order to ensure for the lessor a regular income, whether the mine is worked or not, a fixed

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amount is provided to be paid to him by the lessee. This is called "dead rent".

"Dead rent" is calculated on the basis of the area leased while royalty is calculated on the quantity of minerals extracted or removed. Thus, while dead rent is a fixed return to the lessor, royalty is a return which varies with the quantity of minerals extracted or removed. Since dead rent and royalty are both a return to the lessor in respect of the area leased, looked at from one point of view dead rent can be described as the minimum guaranteed amount of royalty payable to the lessor but calculated on the basis of the area leased and not on the quantity of minerals extracted or removed. ..."

20.Thus, in this case, there is an additional payment of royal apart from lease rent. Whether the royalty paid for consumption mineral amounts would partake the character of purchase tax und Section 7-A is a question to be decided. That exercise has to be do on the basis of the various covenants contained in the lease agreeme and on arriving a factual finding as to how the amount of royalty h been dealt with by the parties to the agreement.

21. In 60 STC 213 relied on by the learned counsel for t petitioner and referred supra, the constitutionality and virus certain notifications issued has been decided and particularly the le of purchase tax on the basis of the notification on the bid amount. T said case can never be compared with a case arising out of the factu situation of the present one, as several additional and different fac are there for consideration. There may be few similar factors availab in both the cases. It is very established and settled principle of l that Courts should not place reliance on decisions without discussi as to how the factual situation fits in with the fact situation of t decision on which reliance is placed. Observations of courts are not be read as Euclids theorems nor as provisions of the statute. T observations must be read in the context in which they appear. Judgmen of courts are not to be construed as statutes. There is always peril treating the words of a speech or a judgment as though they were wo in a legislative enactment, and it is to be remembered that judici utterances are made in the setting of the facts of a particular cas Circumstantial flexibility, one additional or different fact may make world of difference between conclusions in two cases. Each case depen on its own facts and a close similarity between one case and another not enough because even a single significant detail may alter the enti aspect. Useful reference can be had to the judgment of the Supre Court in the case of Haryana Financial Corpn. v. Jagdamba Oil Mill (2002) 3 SCC 496, at page 509.

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22. In the case of THE INDIA CEMENT LIMITED VS. STATE OF TAMIL NA reported in AIR 1990 SUPREME COURT 85 relied on by the learned couns for the petitioner, the legislative competence of the State Legislatu to levy local cess and local cess surcharge on the royalty was question raised and it was decided that the State Legislature has such legislative competence. This decision cannot be taken in aid of t petitioner to maintain the writ petitions in the given facts of t case.

23. The assessing officer in this case has taken the royalty pa as value of the material, which is a taxable goods as per t petitioner's annual report and regarded the turnover as purcha turnover paid by the petitioner to the Government in terms of Section A of the TNGST Act.

24. Section 7A of TNGST Act has been considered by the Supre Court in the case of THE STATE OF TAMIL NADU VS. M.K.KANDASWAMI A OTHERS reported in (1975) 36 STC 191, wherein the Supreme Court uncertain terms has held that the definition of "dealer" in Section (g) of the Madras Sales Tax Act, 1959 included not only a person w carries on business of "selling, supplying or distributing" goods b also the one who carries on the business of "buying" only. Section (1) of the Act could be invoked if the following ingredients mentio in the Section are cumulatively satisfied:

> "(1) The person who purchases the goods is a dealer;
>
> (2) The purchase is made by him in the course of his business;
>
> (3) Such purchase is either from a registered dealer or from any other person;
>
> (4) The goods purchased are goods the sale or purchase of which is liable to tax under this Act;
>
> (5) Such purchase is in circumstances in which no tax is payable under Sections 3, 4 or 5 as the case may be, and
>
> (6) The dealer either
>
> (a) consumes such goods in the manufacture of other goods for sale or otherwise, or
>
> (b) despatches all such goods in any manner other than by way of sale in the State, or
>
> (c) despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce."

The Apex Court further held that the scheme of the Act involv three inter-related but distinct concepts, which might be described "taxable person", "taxable goods" and "taxable event". All the thi must be satisfied before a person could be saddled with liability und

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the Act. The focal point in the expression "goods, the sale or purcha of which is liable to tax under the Act," is the character and class goods in relation to their exigibility. In a way this expressi contains a definition of "taxable goods", that is, goods mentioned the First Schedule of the Act, the sale or purchase of which is liab to tax at the rate and at the point specified in the schedule. The wo "the sale or purchase of which is liable to tax under the Act" quali the term "goods" and exclude by necessary implication goods, the sale purchase of which is totally exempted from tax at all points und section 8 or section 17(1) of the Act. The goods so exempted - n being "taxable ;goods" - cannot be brought to charge under section 7- The words "under the Act" include a charge created by section 7-A als Section 7-A is a charging as well as a remedial provision. T ingredients (4) and (5) in Section 7A(1) are not mutually exclusive a the existence of one does not necessarily negate the other. Both can e exist and in harmony. Ingredient (4) would be satisfied if it is sho that the particular goods were "taxable goods", i.e., the goods, t sale or purchase of which is generally taxable under the Act Notwithstanding the goods being "taxable goods", there may circumstances in a given case, by reason of which the particular sale purchase does not attract tax under section 3, 4 or 5. Section provides for such a situation and makes the purchase if such goo taxable in the case of purchasing dealer on his purchase turnover if a of the conditions (a), (b) and (c) of sub-section (1) of section 7-A satisfied.

25. The Apex Court concluded in the said case by observing that t object of Section 7A is to plug leakage and prevent evasion of tax. interpreting such a provision, a construction which would defeat i purpose and, in effect, obliterate it from the statute book should eschewed. If more than one construction is possible, that whi preserves its workability and efficacy is to be preferred to the o which would render it otiose or sterile.

26. So, the factual aspect with reference to the lease agreeme entered into and the grant order in G.O.Ms.No.234, Environment a Forest Department dated 6.8.1998 has to be considered to come to t conclusion whether the levy of purchase tax in the given circumstanc of the case is correct or not by the Appellate Authority only. I c usefully take support of the observation of the Supreme Court for th purpose.

27. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) SCC 433 = 53 STC 315, for the assessment year 1980-81, the assess filed its return of intra-State sales and inter-State sales returni the gross turnover and claiming deduction of sales to registered deale

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in the case of both the turnovers and also deduction in respect of sa made to Department of Government in the case of turnover of inter-Sta sales. During the proceedings for assessment, the assessee sou adjournment on one ground or another. Eventually the Sales Tax Offi refused to grant any further adjournment holding that the assessee h sufficient opportunity and made assessment to the best of his judgeme under Rule 15 of the Central Sales Tax Act (Orissa) Rules, 1957 a Section 12(4) of the Orissa Sales Tax Act, 1947, treating the lo turnovers returned to be their taxable turnovers. In the case of inte State sales, the Officer disallowed the assessee's claim for deducti representing sales to registered dealers and departments of Governme as well as the amount claimed as deduction on account of tax collec from the purchasers, as the requisite declarations in form C were n forthcoming. He also disallowed the concessional rate of tax at 4 p cent. Similarly, while making an assessment under section 12(4) of t Act, he treated the gross turnover of inside sales as returned by t petitioners to be their taxable turnovers and disallowed the assessee claim for deduction of sales to registered dealers as the prescrib declarations had not been produced.

Thereupon the assessee filed writ petitions in the High Cou challenging the assessments among other things on the ground that t Sales Tax Officer had acted in flagrant violation of the rules natural justice as they were deprived of their opportunity to pla their case and that he was not justified in disallowing the claim f deductions.

The High Court dismissed the petitions on the grounds that t assessee had a right a right of appeal and that that was not a case inherent lack of jurisdiction.

The assessee preferred petitions in the Supreme Court for speci leave to appeal and an officer of the assessee-company also filed wr petitions in the Supreme Court challenging the validity of t assessment orders. In that case, the Supreme Court dismissing t petitions has held that:

(i) the assessee had an equally efficacious alternative remedy way of appeal to the prescribed authority under section 23(1) of t Act, then a second appeal to the Tribunal under section 23(3)(a), a thereafter in the event the assessee got no relief, to have a ca stated to the High Court.

(ii) The instant case was a case in which the entrustment of pow to assess was not in dispute, and the authority within the limits of h power was a tribunal of exclusive jurisdiction.

(iii) The challenge was only to the regularity of the proceedin before the Sales Tax Officer as also his authority to treat the gro turnover returned to be the taxable turnover.

(iv) Investment of authority to tax involves authority to t

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transactions which in exercise of his authority the taxing offic regards as taxable, and not merely authority to tax only tho transactions which are, on a true view of the facts and the la taxable.

The Supreme Court further held that the assessing order clear showed that the assessee was afforded sufficient opportunity to pla their case. Merely because the Sales Tax Officer refused to grant a further adjournments and proceeded to make a best judgment assessmen it could not be said that he acted in violation of the rules of natu justice. The question whether another adjournment should have be granted or not was within the discretion of the Sales Tax Officer a was a matter which could properly be raised only in an appeal und section 23(1) of the Act.

The Apex Court further held that the Act provided for a comple machinery to challenge an order of assessment and the orders assessment in the case could only be challenged by the mode prescrib by the Act and not by a petition under article 226 of the Constituti of India. The Act provided for an adequate safeguard against arbitrary or unjust assessment. The assessee had a right to pre appeals under section 23(1) of the Act subject to their payment of additional amount of tax as enjoined by the proviso thereto, and regards the disputed amount of tax they had the remedy of applying stay of recovery to the Commissioner under clause (a) of the seco proviso to section 13(5) of the Act.

28. The above said three judges judgment of the Supreme Court wou squarely applicable to the facts of this case. In this case also, wh is put in issue, as already stated, is assessment orders, which a appealable to the first appellate authority under Section 31 of t TNGST Act. Even before the first appellate authority, the petitioner not able to get a favourable order. The statute provided anoth opportunity of Second Appeal under Section 36 to the Tribunal.

29. In a comparable factual situation, in the case of State of Vs.Leukoplast (India) Limited reported in (1997) 105 STC 318, t Supreme Court has taken the same view. That was a case in which licence granted by the Drugs Controller under the Drugs and Cosmeti Act, 1940, the assessee was producing zinc oxide adhesive plaste surgical wound dressing, belladona plaster, capsicum plaster and cott crepe bandage. Prior to November 1, 1981, the respondent paid loc sales tax at 6 percent and Central sales tax at 4 per cent on the sa of those goods.

By Notification No.14/41/81-Fin (R&C) dated August 28, 1981, dru and medicines were exempted from the levy of local sales tax in exce of 3 per cent and, accordingly, Central sales tax was also reduced to

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per cent. By another Notification No.5/5/87 (R & C)-8 dated April 1987, the State of Goa, in exercise of the powers under section 10 the Goa, Daman and Diu Sales Tax Act, 1964, amended Schedule II to t Act by inserting entry 77 which specified "drugs and medicine including all I.V. drips". By that notification such goods were total exempted from local sales tax and the sales tax authorities ceased collect Central Sales tax and local sales tax on the produc manufactured by the respondent.

The assessee claimed refund of tax paid in excess of 3 per cent i the period November 1, 1981 to April 1, 1987, on the ground that t goods produced by them being "drugs and medicines", they were liable local and Central sales tax only at 3 percent. Since no action w taken on the claim for refund the assessee filed writ petitions i quashing the assessment orders completed till then. It also fil revised returns for the periods January 1, 1985 to December 31, 198 and January 1, 1986 to December 31, 1986. After the admission of t writ petition the Assistant Sales Tax Officer completed the assessme for the period January 1, 1983 to December 31, 1983, rejecting t claim for refund. Thereupon, the assessee filed a writ petiti challenging the decision of the Assistant Sales Tax Officer. T contention of the assessee was that the assessment orders should be s aside and it was entitled to refund of the tax paid; under mistake law and collected by the State without the authority of law. T department contended that the products did not fall under "drugs a medicines" and as such no question of refund of tax arose.

The High Court, after discussing the nature of the products a referring to the Pharmaceutical Codes, the meaning given to "drugs a medicines" in the Drugs and Cosmetics Act and the understanding of th expression by the excise authorities, and the affidavits filed by t assessee, allowed the writ petitions holding that the produc manufactured by the assessee were "drugs and medicines" coming with the purview of the notifications and that the assessee was entitled refund.

On appeal to the Supreme Court, the Supreme Court set aside t order of the High Court by holding that in order to decide the questi whether the products manufactured by the assessee could be treated "drugs and medicines", it had to be found out how those products we understood and treated in the market, viz., whether, in the ordina commercial sense, those articles were considered as drugs and medicine The question whether the products manufactured by the assessee could treated as "drugs or medicines" could not be answered straight awa Their medical contents, if any, had to be ascertained. Their curati function was to be found out. It had to be decided whether they could called medicament at all, and whether they were used to cure alleviate or prevent disease or to restore or preserve health. The were basically questions of fact which should have been agitated befo the statutory appellate authority. There was no reason for the assess

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to by-pass the statutory remedy and approach the court with a wr
petition and the High Court ought not to have allowed the assessee
by-pass the statutory remedies where the questions could have be
properly agitated and ascertained. Thus, the Supreme Court allowed t
appeal filed by the State of Goa by following its earlier judgment
Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 =
STC 315 , which is referred above.

30. In Union of India and others Vs. Tata Engineering & Locomoti
Company Limited reported in AIR 1998 SUPREME COURT 287, aggrieved
the order of the Division Bench of Patna High Court directing t
Assistant Collector of Central Excise,Jamshedpur to pass without del
appropriate final order on all the price lists submitted by the compa
by taking the price at which the Company sold the vehicles at t
factory gate at Jamshedpur as the normal price for the purpose
computation of the value of the excisable goods and with a furth
direction to the Assistant Collector not to call for any other docume
for the purpose of assessment of the value of the excisable goods on t
basis that the issue has already been covered by various decisions
the Court filed an appeal to the Supreme Court. The Supreme Court he
as follows:

> " ... 4. In our view, this petition should not have been entertained by the High Court at all. The Assistant Collector is entitled to complete the assessment as he thinks fit in exercise of his judgment and according to his understanding of the law and facts. For this purpose, he can call for and examine whatever documents he considers relevant. If the Assistant Collector fails to follow any judgment of the High Court or this Court, the assessee had adequate statutory remedies by way of an appeal and revision against the assessment order. The Court should not try to control the mode and manner in which an assessment should be made. If the Assistant Collector is of the view that enquiries are necessary to be made as to the price at which trucks were sold at the Regional Sales Offices, the Court cannot stop him from making such enquiries.
>
> 5. Mr Sorabjee, appearing on behalf of the respondents, has complained that the assessments are going on endlessly and without due regard to an earlier judgment of the Patna High Court in respect of an earlier assessment year on the very same issues. Whether the controversy raised in this case is covered by an earlier judgment of the High Court is a matter to be decided by the Assistant Collector. He will have to decide all questions of fact and law. He has to make whatever enquiries he thinks necessary for determination of the value of excisable goods. The High Court in exercise of its jurisdiction cannot give guidance to the Assistant Collector about the manner and

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mode in which the assessment should be made.

6. We are of the view that the High Court was in error in entertaining this writ petition. Therefore, the appeal is allowed and the judgment of the High Court under appeal is set aside. There will be no order as to costs. ..."

31. So far as the writ petition in in W.P.No.2359 of 2006 filed respect of the assessment year 1999-2000, the impugned order clea states that though in the pre-assessment notice dated 16.12.2 proposed to include the turnover relating to packing and forwardi charges and objections have been filed by the petitioner, assessment order that has been inadvertently omitted, by giving one mo opportunity by issuing notice, the petitioner was directed to fi objections and upon filing objections, objections of the petitioner ha been rejected by giving reason that the objections filed with invoices would not any way suggest that the sale price itself inclu the packing and forwarding charges also. Equally this is also a factu finding, which can be agitated before the appellate authority for reasons stated in the earlier paragraphs. So is the other; point as whether the demand of differential duty under Section 3(4) on exported turnover of the manufactured goods could also be questioned in the appeal.

32. In the light of the uniform opinion expressed by the Apex Cou of India by Three Judges Bench Judgment in first two of the cases abo mentioned and the Division Bench judgment of the later case, I am the view that the writ petitions cannot be maintained, particular when this Court has come to the conclusion that the reliance with whi the petitioner heavily made on i.e., 60 STC 213 is not a comparab decision to the facts of the present case, the writ petitions a dismissed with liberty to file appeal. However, there is no order as costs. In order to render complete justice, as the O.Ps were entertain by the Special Tribunal in the year 2004 and on abolition they we transferred to this Court and converted as writ petitions, two wee time is granted from the date of receipt of copy of this order to fi appeal, if the petitioner is so advised. The original orders, if an filed by the petitioner are directed to be returned on written reque and on the petitioner submitting the same with xerox copies du certified as true copy.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Secretary
   Commercial Taxes Department
   State of Tamil Nadu
   Fort St.George
   Chennai - 600 009.

2. The Commercial Tax Officer
   Suramangalam Assessment Circle
   Salem.

2 ccs to Spl. Government Pleader, sr. 8803, 8805
3 ccs to Mr.P. Rajkumar, Advocate, sr. 8884, 8886 and 8887

Writ Petition Nos.2359, 2580 and 2631 of 2006

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